No. 14390

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND & ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

I. JURISDICTIONAL STATEMENT

This case is before the Court upon the appeal of the United States of America and Carroll, Hedlund & Associates, Inc., a Washington Corporation, who were defendants in the District Court, from the judgment of the United States District Court for the Western District of Washington, Northern Division, against the appellants entered March 26, 1954 (R. 16-17).

The jurisdiction of the District Court was based

upon the Federal Tort Claims Act of August 2, 1946, Ch. 753, Title 4, Part 3, § 410, 28 U.S.C., § 931. (28 U.S.C.A. §§ 7346(b), 1402, 2402, 2411, 2412, 2671, 2674, 2675, 2676).

The jurisdiction of this Court is sustained by the Judiciary and Judicial Procedure Code, Ch. 646 (62 Stat. 929, 65 Stat. 726, 28 U.S.C.A. § 1291; and 62 Stat. 930, 65 Stat. 727, 28 U.S.C.A. § 1294(1)).

The action was brought in the District Court on a claim against the United States of America to recover money damages for personal injuries alleged to have been caused by the negligence of the Federal Housing Administration, an agency of the United States of America, and Carroll, Hedlund & Associates, Inc., a Washington corporation, its agent, as more particularly appears from the Complaint, paragraphs I-XI (R. 3-8).

Pursuant to Rule 73 of the Federal Rules of Civil Procedure, the appellants filed on May 10, 1954, Notice of Appeal from the judgment of the District Court (R. 22), within sixty days from the entry of said Judgment (R. 16), and within thirty days from the entry of Order Denying Motion for New Trial and Order Denying Motion for Amendment of Findings (R. 21-22), which motions had been timely filed by appellants on April 2, 1954 (R. 17-21).

II. STATEMENT OF THE CASE

The Lake Burien Heights Apartment Project is a large garden-type apartment project, comprising 44 apartment buildings, containing 554 dwelling units, a nursery school, community center and playfield, and covering an area of approximately 35 acres (R. 157-158, 250). Since August of 1950 this apartment project has been owned by the Federal Housing Administrator for the United States of America, and since acquisition by the Government has been managed by Carroll, Hedlund & Associates, Inc., a Washington corporation, as agent for the Federal Housing Administration under the supervision of the Chief Property Manager for the Federal Housing Administration at Seattle (R. 161-162). During the year 1952 the Federal Housing Administration for the United States Government carried out an extensive landscaping improvement program on the project by way of the establishment of extensive lawns and plantings for the beautification of the areas between the apartment buildings. The work was done by Miller-Hansen, Landscape Contractors (R. 159). Some 130,000 square feet of lawns were installed throughout the project site (R. 219). Through the accomplishment of this program the areas between the buildings in the project became beautiful, pleasing to the eye, clean and safe (R. 159, 221; defendants' Ex. A-11, A-12, R.

180, 221). To protect these plantings and the lawn areas, fences were erected around the newly seeded plots to deflect pedestrian traffic and to keep tenants and others off of the newly seeded areas (R. 97-98, 223-224, 231-232, 240, 245-246). These fences consisted in general of upright posts of 1″x4″ or 2″x4″ material, placed approximately 8′ apart, with a single strand of wire (defendants' Ex. A-16, R. 282), strung between the uprights approximately 18″ to 24″ above the ground (R. 220, 240). These were installed along the various walks and streets adjacent to the newly seeded areas in a position from 4″ to 16″ back from the edge of the walk or street, depending upon the circumstances (R. 220, 283). During the performance by Miller-Hansen of the landscaping work these fences were maintained by that firm (R. 224). In July of 1952 this contract work was completed and the task of caring for the newly seeded lawns and the newly planted areas and the maintenance of the protective fences was turned over to the United States Government upon its acceptance of the contract work (R. 224-225). This maintenance work was carried on under the supervision of the Federal Housing Administration by Carroll, Hedlund & Associates, Inc. (R. 224-225). The extent and nature of the program followed for the maintenance of the protective fences is discussed in detail in the Argument section herein (see pp. 26-29).

From June of 1952, and continuously through the time of trial, the appellees were tenants, occupying one of the apartments in the Lake Burien Heights Apartment Project (R. 96). On November 5, 1952, the appellee Jean Dooley (hereinafter referred to as "appellee") left the appellees' apartment at approximatly 5:45 P.M., intending to go to the meat market at the community shopping center (R. 120). The location of appellees' apartment and of the shopping center is shown on plaintiffs' Ex. 5 (R. 89-90, 94-95). For reasons of her peronal convenience (R. 141) she left the apartment building by the rear or basement exit at the back of the building and proceeded through the drying yard adjacent to that exit and, the court found, along a concrete walk adjacent to the apartment building (R. 141, Plaintiffs' Ex. 5). As she was walking hurriedly along said walk she tripped and fell over a wire which was disarranged from the wire fence adjacent to the walk and had fallen upon the surface of the walk, the court found (R. 13, 120-122).

This action was instituted in the Federal District Court to recover damages for the injuries sustained by the appellee as the result of that fall. In their complaint the appellees charged the appellants were negligent in permitting said wire to remain on the sidewalk when the appellants knew, or in the exer-

cise of reasonable care should have known, that the tenants of the apartment used the same, in failing to remove the wire after having been notified that it existed as an obstruction on said walk, and in failing to furnish proper lighting to light the sidewalk (R. 5-6). At the conclusion of the trial the District Court announced its oral decision in favor of the appellees (R. 307, 311). Subsequently the Court entered written Findings of Fact and Conclusions of Law (R. 11-16). The appellants objected to these Findings (R. 10-11) and interposed Motion to Vacate Judgment and for new trial (R. 19) and Motion for Amendment of the Findings of Fact, Conclusions of Law and Judgment (R. 17-19). The Court entered its Judgment in favor of the appellees and against each of the appellants (R. 16).

On this appeal there may be excluded from consideration several of the factual issues which were involved in the trial, and to which a considerable portion of the testimony of the witnesses related. One such issue was the place where appellee fell. Her testimony was uncorroborated on this point and was contrary to the report of her doctor that she had stated to him that she had tripped over a wire stretched tightly between two stakes (R. 82). Circumstantially her testimony was impeached by the fact that in her injured condition she sought assistance at a neighbor's window, which was more

remote from the place she testified the accident occurred than the window of the room of her ground floor apartment in which her husband then was, and also which neighbor's window was likewise closer to the spot where the line of a direct route from her place of exit from the building and drying yard to the meat market intersected the protective fence than was the window of appellees' apartment. (Plaintiffs' Ex. 5, Defendants' Ex. A-1, A-2; R. 179-180). Notwithstanding the Court found that the appellees had sustained the burden of proof on this factual issue (R. 308). It is not contended on this appeal that such finding, being based on conflicting evidence, is reviewable. Similarly, the appellants are not asking for review of the Findings of the District Court on the issues of contributory negligence and damages. Finally, the District Court by making no finding thereon, held in favor of the appellants on the issue of the adequacy of the lighting provided by the appellants in the area where the accident occurred, and that charge of negligence is not in issue on this appeal.

Questions Involved

The sole broad question involved on this appeal is as follows:

Was there any evidence whatsoever to sustain or warrant the finding by the District Court that the

United States of America or Carroll, Hedlund & Associates, Inc., or either of them, had actual or constructive notice of the presence of said wire upon the walk prior to the accident?

Such is the principal question involved herein, because in order to impose liability for an injury to an invitee by reason of a dangerous condition of the premises it must be shown that the condition has either been brought to the attention of the owner or occupant of the property or that such condition has existed for such time as would have afforded him sufficient opportunity, in the exercise of reasonable care, to have become cognizant of and removed the danger. (See Argument pp. 14-25). The question has been raised by appellants' Statement of Points on Appeal filed in the District Court (R. 24-28) and appellants' adoption thereof, which was filed herein (R. 316), as well as by appellants' objections to the proposed findings (R. 10-11), Motion to vacate the Judgment and for New Trial (R. 19), Motion for Amendment of Findings, Conclusions and Judgment (R. 17-19). In appellants' Statement of Points on Appeal (R. 24-28) specification was made to the various particulars wherein appellants urged the District Court erred, each of which in substance involved the question hereinabove stated.

III. SPECIFICATIONS OF ERROR

1. The United States District Court erred in denying appellants' motion made at the close of the plaintiffs' case after the plaintiffs had rested, to dismiss the Complaint for want of evidence sufficient to sustain a cause of action against the appellants, or either of them, for the reason that there was no evidence adduced by the appellees that the appellants, or either of them, were guilty of negligence proximately causing appellee's injury in maintaining said wire barricade, in that there was no evidence that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk (R. 156).

2. The United States District Court erred in making paragraph VI of its Findings of Fact (R. 13-14) in finding therein that said wire was permitted by appellants to obstruct the sidewalk, and in finding therein that appellee tripped over said wire as the result of the appellants' negligence in maintaining the wire barricade, for the reason that in such respects said findings are clearly erroneous and unwarranted and there was an entire absence of evidence to sustain the same in that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

3. The United States District Court erred in making paragraph VIII of its Findings of Fact (R. 14) in finding therein that the appellants, or either of them, were negligent in failing to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk and in failing to remove the wire therefrom after having knowledge, or in the exercise of reasonable care should have had knowledge, that said dangerous obstruction existed upon said sidewalk, and in finding that said negligence of the appellants was a direct, proximate and concurring cause of appellee's injury and damage; for the reason that in such respects said findings are clearly erroneous and unwarranted and there was an entire absence of evidence to sustain the same in that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

4. The United States District Court erred in making paragraph IX of its Findings of Fact (R. 14) in finding therein that the appellee's injuries and damages were the direct and proximate result of the negligence of the appellants, for the reason that in such respects said findings are clearly erroneous and unwarranted and there was an entire absence

of evidence to sustain the same for the reason that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

5. The United States District Court erred in entering Conclusion of Law paragraph I (R. 15), in concluding therein that the appellees were entitled to judgment against the appellants, or either of them, in that said Conclusion of Law (R. 15) is contrary to the evidence and to the law, for the reason that there was an entire absence of evidence to sustain the same for the reason that there was no evidence whatsoever that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire upon the walk.

6. The United States District Court erred in denying appellants' Motion to Vacate and Set Aside the Judgment and Grant a New Trial (R. 19-22) for the reasons that there was an insufficiency of and an entire absence of any evidence to show: that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the presence of said wire on the walk; negligence on the part of the appellants in maintaining said wire barricade and that any such negligence was a proximate cause of the appellee's injury. In the ab-

sence of such evidence the court committed error of law in entering judgment for appellees.

7. The United States District Court erred in denying appellants' Motion for Amendment of Findings of Fact and of the conclusions of law and judgment to conform with the Findings as amended (R. 17-19, 21-22), for the reasons that paragraphs VI, VIII and IX (R. 13-15) of the Findings of the Court were clearly erroneous and unwarranted and without any evidence to sustain the same in the respects hereinabove set forth in Specifications 2, 3 and 4; that the amendments to said findings as proposed in said motion were in conformity with all of the evidence in the case, and there was no evidence to sustain any finding of fact contrary thereto in the particular respect that the same contained no finding of fact that the appellants, or either of them, knew, or in the exercise of reasonable care should have known, of the existence of said wire on said walk, and in the further respect that the proposed amendment to paragraph VIII states that the presence or condition of said wire on said walk was not brought to the attention of appellants, or either of them, nor was it shown how long that said wire was there, which requested finding of fact is essential to a determination of the issues in the case and is the only finding on such issue which is sustained by the evidence.

IV. ARGUMENT

Summary of Argument

The errors which are urged by appellants in each of the specifications of error set forth above turn upon the same issue of law and upon the same question concerning the existence of any evidence in the case as to the actual or constructive notice on the part of appellants, or either of them, of the existence of the wire on the walk. Thus, while each specification is urged herein, the following analysis of law and the evidence is directed to the single question in issue. At the conclusion thereof the particular application to the respective specifications is made.

Statement of Points of Law and Fact Discussed

1. In Order to Impose Liability for Injury to an Invitee Upon Real Property, by Reason of Failure to Maintain the Premises in a Reasonably Safe Condition, the Owner or Occupant Must Have Actual or Constructive Notice of the Dangerous Condition.

Anderson v. Reeder, 42 Wn. (2d) 45, 253 P. (2d) 423;
Chambers v. Slattery, 147 Wash. 538, 266 Pac. 185;
Leek v. Tacoma Baseball Club, 38 Wn. (2d) 362, 229 P. (2d) 329;
Dodak v. Lewis, 187 Wash. 138, 59 P. (2d) 1121;
Mathis v. H. S. Kress Co., 38 Wn. (2d) 845, 232 P. (2d) 921;

Montgomery Ward & Co. v. Lamberson (CAA 9th Cir., 1944), 144 F. (2d) 97;
32 Am. Jur., pp. 559-564, 571-572, Landlord and Tenant, §§ 687, 688, 694.

2. There Was No Evidence That Appellants, or Either of Them, Had Notice, Either Actual or Constructive of the Wire on the Walk.

Transcript of record pp. 37-306.

In the absence of contention of counsel for appellees to the contrary it is suggested that the Court may eliminate, in consideration of this point, the testimony of the following witnesses:

Dr. Paul Ruuska, R. 69-84
Dr. William R. Duncan, R. 166-177
George R. Cooley, electrical engineer, R. 184-203.

3. Each of Appellants' Specifications of Error Is Established by Appellants' Legal Authorities, Point 1 Above, and by the Absence of Evidence of Notice, Point 2 Above.

ARGUMENT

1. In Order to Impose Liability for Injury to an Invitee Upon Real Property, by Reason of Failure to Maintain the Premises in a Reasonably Safe Condition, the Owner or Occupant Must Have Actual or Constructive Notice of the Dangerous Condition.

The status of the appellee at the time and place of the accident was that of an invitee on premises of which the appellants were the owners and occupants. This is established because appellees were

tenants of the appellants (R. 96, 115) and because the place where appellee fell was one of the common walkways on the apartment house project (R. 37, 95, 123; plaintiffs' Ex. 5, R. 89).

Anderson v. Reeder, 42 Wn. (2d) 45, at 48, 253 P. (2d) 423 at 425:

> "Where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof for the common use of such tenants, it is his duty to exercise reasonable care to keep safe such parts which he reserves for common use, and over which he has control. Tenants who use such portions reserved for common use are invitees of the landlord. In order to render him liable to a tenant injured while using such portions, however, it must appear that there was reasonable cause to apprehend such injury. 32 Am. Jur. 561, Landlord and Tenant, § 688."

32 Am. Jur., Landlord and Tenant, § 687, p. 559:

> "The liability of a landlord for personal injuries to a tenant or a person in the right of a tenant, where received while using a portion of the landlord's premises not expressly included in the tenant's lease, and of which the landlord retains possession and control, assuming that the injury was due to defects in the premises attributable to the negligent failure of the landlord to keep the same in a reasonably safe condition, depends, in part at least, upon the character of the tenant's use. A tenant in his use of certain parts of the landlord's premises may be an invitee, a trespasser, or a mere licensee."

Appellants are not insurers of the safety of appellee. *Chambers v. Slattery,* 147 Wash. 538, at 539, 266 Pac. 185, at 186:

> "All other claims of error seem to center around the proposition that respondent was guilty of negligence as a matter of law, and that the court should have so decided. The argument seems to be that the owner of an apartment house having an automatic elevator is an insurer of the safety of tenants operating the same, and is guilty of negligence, if he fails to prevent the possibility of an accident to one riding therein. Such is not the law."

Rather appellants owed to appellee the duty of using reasonable care in maintaining the walk in a reasonably safe condition. 32 Am. Jur., Landlord and Tenant, § 688, pp. 561-563:

> "It is generally held that where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof, such as entrances, halls, stairways, porches, walks, etc., for the common use of different tenants, it is his duty to exercise reasonable care to keep safe such parts of which he so reserves control, and if he is negligent in this regard, and a personal injury results by reason thereof to a tenant or to a person there in the right of the tenant, he is liable, provided the injury occurs while such part of the premises is being used in the manner intended."

Anderson v. Reeder, 42 Wn. (2d) 45, 253 P. (2d) 423.

The duty of appellants, owners of the premises, as landlord, is no different than the duty owed by any owner or occupant of real property to any invitee upon his premises. Consequently all cases against owners or occupants of real property involving injuries to invitees thereon resulting from

a condition of the premises are pertinent to the instant case. One such case, for example, is the case of *Leek v. Tacoma Baseball Club,* 38 Wn. (2d) 362, 229 P. (2d) 329, in which the same rule of reasonable care was applied in a suit between a patron and spectator at a baseball game and the owner of the baseball park. It was held that the spectator was an invitee on the premises. At p. 364 of the official reports (29 P. (2d) 230) the court states:

> "It is uniformly held that the operator of a baseball park, although not an insurer of the safety of its patrons, is bound to exercise reasonable care, or that care commensurate to the circumstances, to protect its patrons against injury."

At page 365 of the official reports (229 P. (2d) 231) the court sets forth the fundamental principle that the owner or occupant of real property is liable for injuries to an invitee only if he knew, or in the exercise of reasonable care should have known, of the existence of the condition causing the injury:

> "Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. *Burr v. Clark,* 30 Wn. (2d) 149, 190 P. (2d) 769; 38 Am. Jur. 678, Negligence, § 32; 65 C.J.S. 351, Negligence, § 5.
>
> "This principle is an integral part of the law relating to the liability of owners or occupants of premises. Generally speaking, the possessor of land is liable for injuries to a business visit-

> or caused by a condition encountered on the premises only if he (a) knows or should have known of such condition and that it involved an unreasonable risk; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make the condition reasonably safe or to warn the visitor so that the latter may avoid the harm *Hudson v. Kansas City Baseball Club,* 349 Mo 1215, 164 S.W. (2d) 318, 142 A.L.R. 858; 2 Restatement of Torts 938; 38 Am. Jur. 754, Negligence, § 96; 65 C.J.S. 521, Negligence, § 45.'

As in the foregoing case, it is essential in order to impose liability upon the owner or occupant of real property that he must have notice, actual or constructive, of the existence of the defect causing the injury. This is true in the case of the owner or occupant standing in the position of landlord.

32 Am. Jur., Landlord and Tenant, § 694, p. 571

> "Actual or constructive knowledge on the part of the landlord of the defect causing the injury is necessary to render the landlord liable It is generally held that to recover for injury received from the defective condition, the burden is on the tenant injured to show that the landlord knew of the defect or by the exercise of reasonable care would have known of it. The negligence of a landlord in regard to the safety of the approaches to the leased premises, and the halls and stairways therein, used by different tenants, is based upon his failure to use ordinary care to keep such portions of the premises in a reasonably safe condition after having notice or knowledge, actual or constructive, of defects therein. It must be shown either that the landlord had knowledge of the defect or that it had been in an unsafe condition for such a length of time that the landlord should

> have known of it. The question as to the length of time a defect must exist in order that the owner may be charged with notice or knowledge thereof depends very largely upon the nature of the defect and the facts of the particular case."

Dodak v. Lewis, 187 Wash. 138, 59 P. (2d) 1121.

This is true also in the case of the owner or occupant of real property standing in the position of shopkeeper: *Mathis v. H. S. Kress Co.,* 38 Wn. (2d) 845, 232 P. (2d) 921. In that case a judgment n.o.v. in favor of the defendant was sustained on appeal. The plaintiff was injured while in the defendant's store, and brought suit to recover therefor, alleging that the defendant had negligently allowed certain liquid to accumulate on the floor, causing plaintiff to slip and fall. At the trial no evidence was introduced by the plaintiff to show how the liquid came to be on the floor or how long it had been there. The defendant denied that there was any liquid on the floor at the time of the accident. At pp. 846-847 of the official reports (232 P. (2d) 922) the court stated as follows:

> "This appeal, since it is not contended that the respondent had actual notice of the liquid on the floor, presents the single question: Was there any evidence from which it could be inferred that the respondent was put upon constructive notice that the dangerous condition existed?
>
> "On a motion for judgment n.o.v., the court is bound to consider the evidence, and the inferences to be drawn therefrom, from the

standpoint most favorable to the appellant. *Witte v. Whitney*, 37 Wn. (2d) 865, 226 P. (2d) 900; *Baker v. Mutual Life Ins. Co. of New York*, 32 Wn. (2d) 340, 201 P. (2d) 893.

"It is the well-established rule that, where the negligence of a storekeeper is predicated upon his failure to keep his premises in a reasonably safe condition, it must be shown that the condition has either been brought to his attention, or has existed for such time as would have afforded him sufficient opportunity, in the exercise of reasonable care, to have become cognizant of and to have removed the danger. *Smith v. Manning's, Inc.*, 13 Wn. (2d) 573, 126 P. (2d) 44; *Wiard v. Market Operating Corp.*, 178 Wash. 265, 34 P. (2d) 875. It is incumbent upon the appellant to produce evidence tending to prove that the respondent had constructive notice of the dangerous condition. See *Kennett v. Federici*, 200 Wash. 156, 93 P. (2d) 333. Liability cannot be predicated upon conjecture.

"Assuming, as we must, that the liquid was on the floor, and that an employee of the respondent was a few feet away, this alone does not prove negligence, since there is an absence of proof as to how long it was there. *Kroger Grocery & Baking Co. v. Spillman*, 279 Ky. 366, 130 S.W. (2d) 786. The floor girl, Mary Fasevich, testified there was no liquid on the floor, so we are not presented with the question of whether or not notice to her was notice to her employer, the respondent. The liquid could have fallen on the floor immediately preceding the accident, and at least some appreciable time must have been shown to have elapsed before constructive notice can be inferred. Appellant produced no such evidence to take the case to the jury."

Montgomery Ward & Co. v. Lamberson (CCA. 9th Cir., 1944), 144 F. (2d) 97, is a similar case. In

that suit the appellee was injured while an invitee in appellant's store when she fell on a ramp near one of the exits. The case was tried to the Judge of the District Court and upon conclusion of the trial findings of fact and conclusions of law were entered and judgment was entered in appellee's favor. At page 98 of the opinion this court stated as follows:

> "Appellees alleged and appellant admitted that Lydia Lamberson entered the store for the purpose of purchasing merchandise from appellant. Therefore she was an invitee, and appellant owed her the duty of maintaining its premises in a reasonably safe condition and of exercising reasonable care to protect her from injury. If appellant violated that duty, it was negligent; otherwise not.
>
> "Appellees alleged, in substance, that while Lydia Lamberson was in the store, appellant, by its agents, servants and employees, threw water on the ramp; that the ramp was thereby made wet and slippery and was in that condition when Lydia Lamberson left the store; that by reason thereof, Lydia Lamberson slipped, fell and was injured; that appellant was negligent in throwing water on the ramp, failing to mop the water from the ramp, failing to put ashes or sand on the ramp, allowing the ramp to be in a wet and slippery condition, and failing to warn Lydia Lamberson thereof; and that appellant's negligence was the proximate cause of Lydia Lamberson's injuries. Appellant denied all these allegations.
>
> "The court did not find, nor was there any evidence from which it could have found, that appellant or any agent, servant or employee of appellant threw water on the ramp, or put or

standpoint most favorable to the appellant. *Witte v. Whitney,* 37 Wn. (2d) 865, 226 P. (2d) 900; *Baker v. Mutual Life Ins. Co. of New York,* 32 Wn. (2d) 340, 201 P. (2d) 893.

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> "Appellees alleged and appellant admitted that Lydia Lamberson entered the store for the purpose of purchasing merchandise from appellant. Therefore she was an invitee, and appellant owed her the duty of maintaining its premises in a reasonably safe condition and of exercising reasonable care to protect her from injury. If appellant violated that duty, it was negligent; otherwise not.
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> "The court did not find, nor was there any evidence from which it could have found, that appellant or any agent, servant or employee of appellant threw water on the ramp, or put or

placed any water on the ramp, or caused any water to be on the ramp. The court did find that the ramp had water on it when Lydia Lamberson left the store, and that by reason thereof, Lydia Lamberson slipped, fell and was injured. These findings are supported by evidence and hence are accepted by us as correct.

"How the water got on the ramp does not appear. The accident occurred on a bright, sunny day. There was no rain or snow. Lydia Lamberson entered the store about 3 p. m. and left about 3:30 p. m. The ramp was dry—had no water on it—when she entered the store. No one, so far as the evidence shows, saw any water on the ramp prior to the accident. The water had not been on the ramp more than 30 minutes when the accident occurred. It may have been there only a few seconds.

"The court did not find, nor was there any evidence from which it could have found, that the fact that the ramp had water on it was known or should have been known to appellant prior to the accident. The court nevertheless concluded that appellant was negligent in permitting the ramp to have water on it, failing to put ashes, sand, salt or matting on the ramp, and failing to notify Lydia Lamberson of the fact that the ramp had water on it—a fact of which appellant itself, so far as the evidence shows, had no notice, actual or constructive.

"The conclusion was unwarranted, for the rule is that, 'In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises, the condition must have been known to the owner or occupant or have existed for such time that it was the duty of the owner or occupant to know of it.' In other words, the owner or occupant must have had actual or constructive notice of the dangerous condition. The rule is applicable and has often been applied to cases like the present one

—cases in which it was sought to hold a storekeeper liable for injuries sustained by an invitee in slipping and falling on the storekeeper's premises. Some of these cases are cited in the margin. Many others could be cited.

"In every such case, the plaintiff has the burden of proving that the defendant had actual or constructive notice of the dangerous condition which is claimed to have been the cause of the accident. So here, appellees had the burden of proving that appellant had actual or constructive notice of the fact that the ramp had water on it. The burden was not sustained. It would have been sustained if appellees had proved that appellant, by its agents, servants and employees, put the water on the ramp; for if appellant did that, it necessarily had notice of the fact. But there was no such proof.

"Mere proof of the fact that an accident occurred did not shift the burden of proof to appellant, nor did that fact create a presumption that appellant was negligent. Instead, the presumption was, and is, that appellant exercised reasonable care. The doctrine of res ipsa loquitur has no application to the facts of this case.

"The duty owing by appellant to Lydia Lamberson was not that of an insurer, but was merely that of maintaining its premises in a reasonably safe condition and of exercising reasonable care to protect her from injury. There was no evidence that appellant violated that duty."

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The identical principles are illustrated by the sidewalk cases against municipalities, the duty of the municipality being comparable to that of the owner or occupant of real property.

Chase v. Seattle, 80 Wash. 61, at 64, 141 Pac. 180 at 181; *Zellers v. Bellingham,* 83 Wash. 601, 145 Pac. 613; *Johnson v. Ilwaco,* 38 Wn. (2d) 408, 229 P. (2d) 878.

The case of *Russell v. Grandview,* 39 Wn. (2d) 551, 236 P. (2d) 1061, illustrates the distinction between a defective condition actually created by a city and those in which the defects occurred for some other reason than the active negligence upon the part of the city. In the latter type of case the duty to correct the condition, as in the instant case, cannot arise until the city has actual or constructive notice of the defect. At p. 554 of the official reports (236 P. (2d) 1063) the court states:

> "The city seeks to draw an analogy between the facts of this case and those involved in cases where injuries were sustained arising out

of defects in streets or sidewalks, or obstructions in the way of the normal use thereof, or breaks in pipes carrying gas. Liability in such cases, and those of like import, arises out of negligence in failure to keep the instrumentalities in a proper state of repair. If the defects do not occur by reason of active negligence upon the part of the city ,the duty to repair cannot arise until the city has actual or constructive notice of the defects. The city becomes negligent when, after such notice, it fails to make the necessary repairs. If, however, the dangerous condition is caused by agents of the city in the performance of their duties, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the city. *Nevala v. Ironwood,* 232 Mich. 316, 205 N.W. 93, 50 A.L.R. 1189, and annotation appended."

2. There Was No Evidence That Appellants, or Either of Them, Had Notice, Either Actual or Constructive, of the Wire on the Walk, Prior to the Accident.

The only finding made by the District Court of negligence on the part of the appellants, or either of them, was in failing to maintain the wire barricade adjacent to the sidewalk where appellee fell in a reasonably safe condition and in permitting the wire to remain on the walk, and in failing to remove the same (which is the same thing) after the appellants knew, or should have known, of the presence of the wire on the walk (R. 11-15).

The only reason necessitating any particular maintenance of the wire fences, was that heedless

tenants, children of tenants, and paperboys, from time to time broke down or cut the fences in various parts of the project (R. 100, 116, 242, 262). Such is the only evidence or inference to be derived from the evidence as to how the particular wire over which the appellee fell came to be upon the sidewalk.

Appellants' Maintenance Program

The appellants had a definite program for the maintenance of these wire fences (R. 212-216, 224-226, 252-256, 261-262, 271-276). This program consisted of the assignment of one man, Clarence Dykeman, to the duty of inspecting and repairing all of such fences on the project site each day. Commencing each morning, this man stayed with the job until every fence requiring it was repaired (R. 288). He worked on the day of the accident and regularly during the preceding week (defendants' Ex. A-13, A-14; R. 180-182, 281-282, 284-286). Consequently, all fences on the project were inspected and all those which had been broken down were repaired or replaced once each day between the hours of 8:00 A.M. and 4:30 P.M. (R. 281-288). In addition, the appellants coordinated the work of numerous other outside maintenance personnel (defendants' Ex. A-13, R. 181) so as to afford additional regular daily inspection and repair, if necessary, of these fences.

A clean-up man passed over the entire project area once each day, picking up any papers and debris on the lawn areas. In making his rounds this man also reported any fences which might be in need of repair, or made temporary repairs and reported the condition to the project office, from which a man was dispatched to complete the work (R. 252-256, 273). Two men were regularly assigned to garbage pickup from the various apartment buildings. This pickup was made daily and in the course thereof these men inspected and repaired these fences or reported the condition to the project office for the dispatch of a man to do the repair work. Further, a street sweeping and cleanup detail of men swept the streets in the project daily and were otherwise instructed to, and did, report or repair any fences in need thereof. Further, the night watchman who made nightly rounds of the project area, repaired fences found to be out of order. In addition to these five, regular daily sources of maintenance of these fences, other personnel on the project maintenance force were instructed to repair or report to the office of the project all fences found by any of them to be in need of repair. While the nature of the duties of such other personnel did not take them regularly and daily over the entire project site, nevertheless, in the course of their daily duties they had occasion to pass to and fro about the various parts

of the project. Finally, the appellants received and serviced, through a regular office procedure, at the project office, any complaints or reports received from tenants or employees, of fences out of order. These calls were serviced daily and were not allowed to carry over in any instance to the following day (R. 273-276, 289).

At the conclusion of the trial the District Court announced its oral decision in favor of appellees and stated therein, in part, as follows (R. 308):

> "That the Court does not believe that there is a convincing showing or a showing by a preponderance of the evidence or any showing at all on the part of the defendants or anyone else in this case that a particular individual did actually make or that any individual acting for or on behalf of the defendants made an inspection of the premises near the place of the accident between the time the defendants' employee Dykeman ended his day's work and the time of the occurrence of this accident."

It is respectfully submitted that to impose upon the appellants the requirement of the standard thus set by the court to every hour of the day, is to make of the appellants insurers of the safety of their tenants, contrary to the authorities hereinabove cited pp. 15-25). The employee Dykeman, referred to, terminated his work at 4:30 P.M. The accident occurred at approximately 5:45 P.M. (R. 139). The appellants' night watchman, Cvetikovs, commenced work at 6:00 P.M. (R. 205).

It is further respectfully submitted that it is indicated by the above statement from the court's oral decision that the court overlooked the requirement of the law that the appellants must have notice of the wire on the walk, actual or constructive, before the accident; for failure to make an inspection within the span of time specified by the court could not have been negligence as to appellants nor a proximate cause of the accident unless it were also shown that the wire was on the walk during that interim. As this court stated in the *Lamberson* case, 144 F. (2d) 97, supra, p. 20, it may have been there just a few moments, so far as appears from the evidence.

Appellants Had No Actual Notice

The appellees had the burden of showing that the appellants either knew, or in the exercise of reasonable care should have known, of the presence of the wire on the sidewalk. Not one witness in the case testified that the appellants, or either of them, actually knew that the wire was on the walk prior to the accident. It is believed that appellees will not contend to the contrary. There is no statement or exhibit in the record that prior to the accident any one informed appellants, or either of them, or any agent or employee, that the wire was obstructing the walk. There is no testimony or exhibit indicat-

ing that any employee or agent of the appellants, or either of them, placed or dropped said wire on the walk or otherwise caused the same to be there or allowed the same to remain there after seeing it. To the contrary, all of the evidence is that tenants, principally children of the tenants, wilfully or carelessly broke down the wire fences from time to time (R. 100, 116, 242, 262).

The court made no oral finding as part of its oral decision that appellants had actual knowledge of the presence of the wire (R. 307-311).

Appellants Not Chargeable with Constructive Notice

Nor was there any evidence in the case that the appellants could have in the exercise of reasonable care known of the existence of the wire on said walk. There was no evidence whatsoever as to how long the wire had been there prior to the accident. Under the legal authorities above cited this is essential to a finding that the appellants should have known of its presence.

In this respect we have considered the testimony of Yvonne Hart (R. 88-95, at R. 90). Hers is the only testimony in the entire case that could be related to the wire over which the appellee fell and which in any respect indicates that the fence was in disrepair at any time prior to the accident. Her testi-

mony was that one week before November 5, 1952, while going to appellee's apartment to visit her, she observed a wire from a fence along the walk in question lying in the middle of the sidewalk. She testified, however, that in leaving the Dooley residence she did not see the wire though she left by the same route as she arrived (R. 92) and though she had her little boy with her, whom she stated she had taken the precaution to warn about the wire on their way in. Experience would indicate that a mother would have observed the same condition on the way out had it not been corrected in the interim. Further, the appellee Jean Dooley testified (R. 134-138) that in the week prior to her accident she had passed the place where she fell, daily, going and coming, and perhaps several times a day, without noticing the particular wire was down, as testified by Mrs. Hart. Appellee testified she had passed that spot many times during the week before the accident (R. 138).

Further, the witness Clarence Dykeman testified (R. 280-288) that he had repaired all of the fences on the project site in need of repair each day commencing at the time he started to work at 8:00 A.M. and continuing until the job had been completely performed and all of these fences were in proper repair. His time record is in evidence (defendants' Ex. A-13, R. 182) confirming the fact that he had

worked his regular shift during the week preceding the accident. It is further indicated by the court's oral decision (R. 307) that the court concluded from the evidence that the wire was not in the condition as testified by Mrs. Hart from the time she had seen it. Had the court concluded otherwise it would not have specified that the negligence of the appellants consisted of failure to have an inspection made of the area of the premises near the place of the accident between 4:30 P.M. on the day of the accident and 5:45 P.M., the time it occurred. Consequently there is no evidence in the case to show that the appellants should have known of the existence of the wire on the walk, prior to the accident.

3. Each of Appellants' Specifications of Error Is Established.

The foregoing analysis of the law and the evidence establishes, we submit, that the District Court erred in each of the respects specified in the specifications of error above (pp. 9-12). As indicated in the summary of argument herein, each of the acts or determinations by the District Court so specified is in error because there was no evidence in the case that the appellants, or either of them, knew or should have known that the wire was on the walk prior to the accident. The argument herein of the law and the evidence is, accordingly,

addressed to each of the specifications of error, and, we urge, establishes each of the specifications of error. In particular it is urged and contended with respect to each of the specifications as follows:

Specification 1. That at the conclusion of the appellees' case there was no evidence of either actual or constructive notice to the appellants, or either of them, to warrant a finding that the appellants had either actual or constructive notice of the presence of the wire on the walk, and therefore appellees failed to produce sufficient evidence to sustain a cause of action against the appellants, or either of them. The appellants' motion to dismiss should have been granted. (Argument pp. 14-32.)

Specification 2. The absence of any evidence that the appellants, or either of them, had notice, actual or constructive, of the existence of said wire on said sidewalk prior to the accident renders unwarranted and clearly erroneous a finding by the court in paragraph VI of its findings (R. 13-14) that said wire was permitted by the appellants to obstruct the sidewalk and a finding that appellee tripped over said wire as the result of the negligence of appellants in maintaining the wire barricade. (Argument pp. 14-32.)

Specification 3. The absence of any evidence that the appellants, or either of them, had notice, actual or constructive, of the existence of said wire on said

sidewalk prior to the accident renders unwarranted and clearly erroneous a finding by the court that appellants, or either of them, were negligent in failing to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk and in failing to remove the wire therefrom. Accordingly, the District Court erred in making paragraph VIII of its findings of fact in the respect set forth in specification of errors No. 3. The legal authorities hereinabove discussed clearly establish the necessity for notice, either actual or constructive, in order to find a breach of duty on the part of appellants to the appellee. The absence of such evidence precludes the finding by the court of the existence of such actual or constructive knowledge, and in the absence of such a finding, the further finding by the court in said paragraph that said negligence on the part of appellants was a direct, proximate and concurring cause of appellee's injury and damage is unwarranted and clearly erroneous. (Argument pp. 14-32.)

Specification 4. The absence of any evidence that the appellants, or either of them, had notice of the existence of said wire on said sidewalk prior to the accident renders unwarranted and clearly erroneous the court's finding in paragraph IX that appellee's injuries and damages resulted proximately and directly from the negligence of the appellants under

the legal authorities and analysis of the evidence hereinabove set forth. (Argument pp. 14-32.)

Specification 5. The conclusions of law made and entered by the court under the cases set forth above would be sustainable only upon the basis of evidence to show actual or constructive knowledge on the part of appellants, or either of them, of the presence of the wire on the walk. There being no such evidence in the case, no finding of fact to such effect was warranted and paragraph I of the Conclusions of Law was accordingly erroneous. (Argument pp. 14-32.)

Specification 6. The United States District Court should have vacated its judgment and should have granted appellants' motion for new trial by reason of the error of law committed by the court in entering such judgment in the absence of any evidence to show that the appellants, or either of them, knew or should have known of the presence of said wire on the walk and the court erred in denying appellants' said motion. (Argument pp. 14-32.)

Specification 7. The United States District Court should have amended its findings of fact in accordance with appellants' motion therefor (R. 17-19). The findings therein proposed in amendment to paragraphs VI, VIII and IX of the court's findings contained no finding that the appellants, or either

of them knew, or in the exercise of reasonable care should have known, of the existence of said wire on said walk. Further, the proposed amendment to paragraph VIII of the court's findings as set forth in appellants' said motion was that the presence of the wire on said walk was not brought to the attention of the appellants, or either of them, nor was it shown how long said wire was there. Thus, in accordance with the authorities hereinabove cited and the evidence in the case (argument pp. 14-32), appellants' said proposed findings were in accordance with the evidence. Further, appellants' proposed amendment to paragraph VIII of the court's findings, as set forth in appellants' said motion, is the only form of finding on said issue which would be warranted and not clearly erroneous under the evidence. The court should have granted appellants' said motion for amendment of Findings of Fact for the further reason that paragraphs VI, VIII and IX of the court's findings were clearly erroneous and unwarranted in the respects set forth in specifications of error Nos. 2, 3, and 4, which errors were corrected by the appellants' proposed amendment. Upon so amending its findings in accordance with appellants' proposed amendment, the court should further have granted appellants' motion to amend the conclusions of law and judgment to comply with said findings as amended. (Argument pp. 14-32.)

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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